***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

76-1488

# UNITED STATES COURT OF APPEALS

*for the*

# SECOND CIRCUIT

B/s

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT ERCOLI,

Defendant-Appellant.

Received Pro Se Section 11/29/76

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1488

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UNITED STATES OF AMERICA,

Appellee,

-v-

ROBERT ERCOLI,

Appellant.

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# BRIEF FOR APPELLANT

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## Preliminary Statement

Robert Ercoli appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on June 25, 1976 after trial before Honorable Charles L. Brieant, Jr. and a jury of a conspiracy in violation of Title 18 United States Code, Section 371 and two counts of perjury in violation of Title 18 United States Code, Section 1623.

Indictment 75 CR 1040 was filed in the United States

District Court for the Southern District of New York and charged the appellant on one count of conspiring to deny the Internal Revenue Service of truthful and accurate information pertaining to the personal income of police who held off-duty jobs in violation of Title 18 United States Code, Section 371 and two counts of making false statements to a grand jury in violation of Title 18 United States Code, Section 1623. Following the jury's verdict of guilty on all three counts of the indictment, the defendant was sentenced to five years imprisonment by Mr. Justice Brieant on October 6, 1976.

## Questions Presented

1. Where no agreement is proved between the defendant and any of the employers concerning the payment of wages in cash and concerning the filing of W-2 tax forms on wages earned by policemen on side jobs, can a conspiracy be found against only one of ninety named co-conspirators that he has denied the United States information concerning their earnings?

2. Where no agreement is proved between the defendant and any co-conspirator named in the indictment regarding the reporting of said income on their respective tax returns and the evidence shows that the failure to so report was the independent decision of all the government witnesses, can a conspiracy be found against the defendant?

3. On Count Two of the indictment relating to the date of a PBA meeting where a 25 cent administrative fee was agreed upon, was a reasonable doubt of defendant's guilt established as a matter of law by the vague, erroneous and sometimes false testimony of the government witnesses and by the corroboration of defendant's recollection by one government and two defense witnesses?

4. On Count Two of the indictment, was the date of said PBA meeting material to the grand jury investigation within the meaning of Title 18 United States Code, Section 1623?

5. On Count Three of the indictment relating to whether a meeting between the defendant and Telephone Company officials took place at police headquarters or at their offices at 10 County Center Road, was the evidence sufficient to sustain defendant's conviction or was there a reasonable doubt as a matter of law?

6. On Count Three of the indictment, was the place of said meeting material to the grand jury investigation within the meaning of Title 18, United States Code, Section 1623?

## Statement of Facts

The Town of Greenburgh had a police force of about one hundred men. Since about 1968, many members of that force engaged in moonlighting activities consisting of performing side jobs for various companies in Westchester during their off-duty hours. The defendant was initially one of said men employed by Technicon in the year 1969. Said company paid the policemen by check. Although 73 of them were so employed, none of them reported their income from said job to the Internal Revenue Service. This was the first side job alleged in the indictment. The defendant had no role in administering it.

In 1971 defendant was assigned as a lieutenant of the Greenburgh Police Department. It was agreed amongst the officers themselves that future side jobs would be administered by the Traffic Division, on their own time and at their own expense. This followed a directive of the Police Chief, Halstead, that took effect in February of 1971.

The first side job administered by the defendant Ercoli was the Whitmore job which began in March of 1971. He received a fee of 25 cents per hour to administer said job. The job lasted until October 1971. The company paid the men by check and issued W-2 forms on their earnings. A number of the policemen did not report said income to the Internal Revenue Service. The sole income received by the defendant

was the said administrative fee which totaled about $900.00 and which he declared to the Internal Revenue Service as income.

The Whitmore job overlapped the Telephone Company job which began on July 13, 1971. This was the last job administered by the defendant. He received approximately $400.00 for administrative fees which he did not feel was income. He claimed to have used it for expenses and did not declare it. The 58 policemen who worked for the Telephone Company were paid in cash. No W-2 forms were issued by the Telephone Company. None of them reported said income to the Internal Revenue Service. The defendant did not solicit this side job employment. The decision to pay cash and not issue W-2 forms was solely that of the Telephone Company. It had indulged in an identical procedure with other police departments in the Westchester area at about the same time. The decision of the police officers not to report their income was individually made. There is no evidence otherwise.

No other jobs were administered or participated in by the defendant after the Telephone Company job ended on or about February 6, 1972.

Of the ninety co-conspirators named in the indictment, the defendant and one other Greenburgh policeman, an Officer Holley, were indicted. The latter was allowed to plead to a lesser charge. The defendant, therefore, is the sole person

convicted of the conspiracy charge of the indictment. The two witnesses for the Telephone Company were given immunity as were all of the policemen called to testify for the government.

Although it was not formally recorded in the minutes of the PBA meeting of March 1971, there was informal approval of the membership that defendant receive a 25 cent an hour fee for administering side jobs. Promptly thereafter he began receiving said fee for the Whitmore job. The other policemen were aware of it. It had come about as a result of a department directive of Police Chief Halstead that ordered the administration of side jobs to be done on their own time and at their own expense. The directive was made in February 1971 and the fee was approved and actually taken the following month.

In July 1971 a strike developed affecting all of the Telephone Company facilities in Westchester and surrounding areas. Violence had occurred in certain locations. The defendant went to the Telephone Company headquarters to investigate and determine what police action was required. The government contends that said meeting took place at Telephone Company headquarters (10 County Center Road). The defendant recalled that it took place at police headquarters. During the seven month strike the defendant visited the Telephone Company premises on a daily basis. He candidly admitted

that it was quite possible that the meeting where a discussion about hiring policemen was had took place at Telephone Company headquarters. The evidence is uncontroverted that the defendant did not solicit side job employment from the Telephone Company.

## POINT I

### THE EVIDENCE IS INSUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTION OF CONSPIRACY

The claimed object of the conspiracy in this case was to defraud the United States by denying to the Internal Revenue Service truthful and accurate information pertaining to the personal income of police who held certain off-duty jobs.

None of the employers in this case were named as co-conspirators or indicted in the case at bar. There is no evidence that they conspired with the defendant or any of the co-conspirators named to pay wages in cash or to not file W-2 income forms with the government. If the employers had filed W-2 forms, the government would have been able to perform its tax collection responsibilities in the normal manner. Through its computers it could easily have identified the income with the tax payer involved. Any agreement between the policemen themselves would have been meaningless, since the government would already have the income information it was entitled to and could take appropriate action against those policemen failing to report it. Although many policemen failed to report their income, the evidence is undisputed that it was their own individual decision. The record shows that Whitmeyer Bros. did, in fact, send out W-2 statements for the earnings of off-duty policemen during the year 1971 (Page 516). The

evidence further discloses that a number of policemen who worked for Whitmeyer did not report their earnings therefrom. Would this not further show that each individual acted on his own initiative?

The only kind of conspiracy that would seem to make sense would be an agreement between the policemen and the employer that they would be paid in cash and that W-2 forms would not be sent out. The government has failed to prove any such agreement. It is, in fact, bound by the testimony of its own witnesses in this regard. None of the police officers produced by the government denied that his failure to report his income to the Internal Revenue Service was his own decision. The employer witnesses for the government testified that the payment in cash and the failure to file W-2 forms was a Telephone Company decision and not by any agreement with the policemen or defendant. Where, then, is there proof beyond a reasonable doubt that the defendant Ercoli conspired to deny the Internal Revenue Service information pertaining to the side job earnings of policemen? The overt act necessary to this charge of conspiracy was not established. He did not go to the employers and ask for cash payments. He did not ask them to withhold W-2 forms. These were the acts which would tend to further and carry out the conspiracy. They were never proved.

The evidence in this case should also be considered in the light of its background. Some ninety policemen were named as

co-conspirators. Most of them failed to report their outside job income as required by law. There was an internal dispute between two opposing factions of the Greenburgh police force. An action was started in the Westchester Supreme Court by one faction who wanted Officer Purdy removed as President of the PBA. The defendant was a close friend of Mr. Purdy. He was also a close friend of Officer Holly. Shortly thereafter, all three of them became the sole targets of the grand jury indictment.

While the government has discretion in determining who to indict in a particular case, it also has a duty to prosecute where a crime has been committed. That it its basic function and purpose. It is difficult to conceive how only three individuals were selected out of this large group of co-conspirators. The defendant Ercoli appears to be the scapegoat in this entire inciden' His conviction obviously serves the vendetta of the opposing faction of other policemen involved in this matter. His indictment was unwarranted and his conviction was not established by adequate proof.

The governemnt has attempted to broaden the wide sweeping net of a conspiracy prosecution to convict the defendant Ercoli. The court should look upon such attempts with disfavor. Grunewald v. U.S. 77 S.C. 963, 353 US 391.

The conspiracy conviction should be reversed.

## POINT II

THE GOVERNMENT HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF AS TO THE MATERIALITY OF THE FALSE STATEMENTS ALLEGED IN COUNT TWO AND THREE OF THE INDICTMENT.

The federal statute expressly requires a false statement to be "material" before it is deemed a perjury violation thereof. Title 18 USCS Section 1623. The government has the burden of establishing that necessary element of the crime. United States v. Mancuso, 485 F 2d 275 (2d Cir., 1973) citing United States v. Stone, 4 29 F 2d 138 (2d Cir., 1970).

The defendant Ercoli is charged with making false statements to a grand jury. In such case, the test of materiality is whether the false statement had a "natural effect on tendency to influence, impede or dissuade the grand jury from pursuing its investigation". United States v. Doulin, Dkt. Nos. 76-1102, Slip op. 4275, 4281 (June 21, 1976) quoting Carroll v. United States, 15 F 2d 951, 953 (2d Cir.) cert. den. 27 US 763 (1927).

The scope of the grand jury investigation is set forth in the testimony of the grand jury forelady, Jeanne C. Cole, as follows (Page 318, lines 15-25; Page 319, lines 2-3):

"THE COURT: Yes. What subject matters were you investigating?

THE WITNESS: The subject matter was basically in two phases, as I recall it: We were attempting to determine whether or not there had been any conspiracy either internally, among the members of the Greenburgh Police Department, or if

there was any conspiracy between any members of that Police Department and the businesses for which the policemen of that company worked for their off-hours jobs, employment outside of their regular police work.

Q. What type of conspiracy were you investigating?

A. Conspiracy relative to the failure of the police officers, or any members of that Police Department, to report the income that they had earned on those side jobs."

The basic thrust of the grand jury inquiry, therefore, was to determine whether there was an internal conspiracy amongst police officers or between the policemen and their employers not to report the income earned on their side jobs.

MATERIALITY AS TO COUNT TWO

Count Two of the indictment states:

> "It was material to said inquiry to ascertain whether the defendant ROBERT ERCOLI had been authorized by the P.B.A. prior its meeting on January 12, 1972 to remove $.25 per hour as an administrative fee from the cash wages earned by the Police in the off-duty job at the Telephone Company".

The evidence clearly shows that the government failed to prove that the fee had not been approved prior to the PBA meeting of January 12, 1972. The evidence is overwhelmingly in favor of defendant's testimony that there was prior approval. Although this practice may not have been formally recorded in a prior meeting of the PBA, it was a de facto situa-

tion. This was confirmed by a government witness, Officer Walsh (Page 131, line 21; Page 133). Further confirmation came from Officer Gory (Page 442, 443) who further testified that the fee was actually taken out on the Whitmore job (Page 444) which took place in March 1971 (Page 453). This practice was adopted shortly after a directive of Police Chief Halstead dated February 1971 (Page 475) instructing his men to administer side jobs on their own time and at no expense to the municipality. Would it not be reasonable to assume that said fee was agreed upon as a practical way of meeting the administrative expense of phone calls, travel, etc., necessary to arrange and supervise these side jobs and of complying with the Chief's directive?

Assuming, however, that defendant's testimony was false, the question here is what did it mean to the grand jury? How did it impede or influence their investigation? If the grand jury was trying to determine how active a role the defendant took in the alleged conspiracy, it would appear to have aided their inquiry that the defendant admitted receiving a 25 cent administrative fee for ten months prior to said PBA meeting of January 12, 1972. If, in fact, the meeting of January 12, 1972 was the first time the fee was approved, how did it relate to the failure of most of the police officers to report their income for the years 1968, 1969, 1970 and 1971? Common sense would dictate that any inquiry into alleged wrongdoing

by a defendant at an earlier time, at a time when the officers were not, in fact, reporting their income, was the natural and reasonable way to proceed.

If the defendant had admitted that the fee was first approved at the January 12, 1972 meeting, would a further investigation have occurred? It is respectfully submitted not. The question was, in fact, irrelevant and immaterial to the basic issue of conspiracy. It does not meet the tests of the courts which require that "a truthful answer would have been of sufficient probative importance to the inquiry so that, at a minimum, further truthful investigation would have occurred". United States v. Mancuso, supra; United States v. Friedman, 445 Fed 1220 (2d Cir. 1971).

The conviction on Count Two should be reversed.

MATERIALITY AS TO COUNT THREE

Count Three of the indictment reads as follows:

COUNT THREE

"The Grand Jury further charges:

18. It was material to said inquiry to ascertain whether the defendant ROBERT ERCOLI went to the offices of the Telephone Company at 10 County Center Road on or about July 13, 1971 and at that location had a meeting with Thomas Owens and Richard Lillis in which the defendant ROBERT ERCOLI negotiated the hiring of Police by the Telephone Company as security guards during the Strike."

Here, again, the question of materiality comes down to whether a truthful/or false answer as to the place of a meeting with phone company officials would have aided or impeded the investigation of a conspiracy. Defendant's recollection was that it occurred at police headquarters. The evidence shows that the Telephone Company strike occurred on July 13, 1971 and that off-duty policemen were hired that day by the Telephone Company for security work. Did it matter where the meeting took place? There is no government evidence that the defendant solicited employment, or cash payments or the withholding of W-2 tax forms from the Telephone Company. What, then, is the relevancy of the place of the meeting? It was not an isolated, single occasion. The evidence shows that there were numerous meetings during the seven-month strike. These took place on a daily basis between the defendant and the Telephone Company officials.

It is inconceivable that a truthful answer to the situs of such a meeting could have aided their investigation and that a false answer would tend to impede it. What really mattered in the grand jury inquiry was what was said at the meeting. The conversation of those present at the meeting would, of course, be material to the issue withholding information from the U.S. government. The situs of the meeting could not in any way have helped to establish the defendant's guilt or innocence of the crime charged. A strike had oc-

curred. Violence was imminent. It was natural for these people to meet to discuss the situation. It was material and important to know what they said to one another. It was irrelevant whether it took place at Police headquarters or at 10 County Center Road. The evidence is replete with examples of government witnesses not being sure of where or when certain conversations took place. Why should a higher, more rigorous standard of recall be applied to the defendant? Why should a mere detail be relegated to the status of a serious crime? It is respectfully submitted that such is not the purpose of the applicable federal statute and that this Court should not countenance its import beyond a reasonable interpretation of materiality.

During the trial there was even doubt in the mind of the trial judge concerning the importance of the place of said meeting as it relates to convicting him for perjury. Quoted below is the trial colloquy between the prosecutor and judge on this point:(Page 336, lines 1-25, Page 337, lines 1-4)

"THE COURT: Is the inconsistency or the falsity the fact of the dispute over where the meeting took place?

MR. WEINBERG: That is correct.

THE COURT: Whether it took place at 10 County Center Road, as the Telephone Company executives testified, or in the Greenburgh Police Station, as Mr. Ercoli testified?

MR. WEINBERG: That is correct, your Honor.

THE COURT: That's all there is to it?

MR. WEINBERG: That is correct, your Honor. And the government believes that there is a strong motive there for Mr. Ercoli to lie concerning that count in the indictment.

Mr. Ercoli in the grand jury creates the impression that he was not anxious at all for the policemen to be hired by the Telephone Company, that the Telephone Company came to him in order to obtain police officers who were willing to work for the Telephone Company during the strike.

THE COURT: And the knowing and wilful falsification that is found in that count is solely as to where the meeting took place, a matter of some half mile distance?

MR. WEINBERG: Your Honor, I think--

THE COURT: It is going to be very hard to send somebody away on something like that.

I'll have to come back to that point."

If the materiality of the date of said meeting hinged on whether the defendant solicited side jobs from the Telephone Company, then it should be clearly deemed immaterial. The trial judge, in ruling it material, did in fact exclude that factor in his order and memorandum dated September 13, 1976, denying defendant's motion for an acquittal. The Court found that the solicitation of side jobs was initiated by the Telephone Company. Quoted below (at Page 5 of said

order) is the portion of Judge Brieant's opinion herein-before referred to:

> "...That the solicitation was in fact initiated by the telephone company, and that the Court struck those questions and answers dealing with the question of who solicited on the ground that Ercoli's answers were truthful, does not mean that the place of the meeting is not material to the legitimate purposes of the entire Grand Jury inquiry...."

The conviction of the defendant on Count Three of the indictment should be reversed.

## POINT III

### THE GOVERNMENT HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF AS TO THE DEFENDANT'S KNOWLEDGE, WILLFULNESS AND INTENT IN MAKING THE FALSE STATEMENTS ALLEGED IN COUNT TWO OF THE INDICTMENT

The essence of Count Two of the indictment is that the defendant committed perjury by denying knowledge that at a meeting of the PBA held on January 12, 1972, a 25 cent per hour administrative fee was agreed to be deducted from the cash wages earned by the police in their off-duty jobs at the Telephone Company.

The defendant testified that such deduction was agreed to at a meeting of the PBA held approximately ten (10) months before said meeting of January 12, 1972. The testimony at the trial failed to establish that the said $.25 per hour administrative fee deduction had not been approved prior to said meeting of January 12, 1972.

At the trial the defendant further testified that he actually made the deduction and utilized the proceeds for various purposes. There was nothing illegal in this arrangement amongst the police officers to set aside a part of their earnings for the cost of administering the assignment of off-duty jobs to policemen. In fact, the testimony shows that Chief Halstead had directed that such off-duty work be ad-

ministered during off-duty hours, at no expense to the municipality and fairly amongst the men.

What then, was the possible motive for the Defendant Ercoli to lie about this matter? He was in fact testifying that the arrangement existed ten (10) months before the government contended in the indictment. The defendant obviously had no intent to deceive the grand jurors about the existence of an administrative fee agreement. He admitted it, but his recollection of when it occurred was more strongly in his mind for the earlier date. This recollection of the defendant was given before the Grand Jury voluntarily and about four years after the event. Perhaps his recollection was faulty but there was no other proof at the trial to establish that said administrative fee was not approved prior to January 12, 1972. When all of the evidence is considered in this case, the date of the meeting when said fee was approved becomes a collateral issue.

Willfulness and a criminal intent must be shown before perjury can be found. Beckanstin v. US, C.A. La 1956, 232 Fl; US v. Laurielli, DC Pa., 1960 180 F Supp. 30, aff'd 203 Fed. 830, certiorari denied 82 S.C. & 406, 368 US 961.

In the Federal statute on perjury generally the word "willfully" is expressly used. Title 18, Section 1621. In the statute under which the defendant is charged Title 18, Section 1623 the word "knowingly" is used in reference to defining false statements constituting perjury. It is sub-

mitted that the words "willfully" and "knowingly" are synonomous terms in the text of both of these sections dealing with perjury.

The defendant may have been mistaken but no intent to deceive has been shown by the evidence. He gave his best recollection of events that had occurred many years before he was called upon to testify. If his recollection was faulty or poor, it was a mistake shared by many of the government witnesses in their attempts to collect the sequence of events.

Here are some specific examples, selected at random, from the trial testimony that should be considered in evaluating the relative quality of Mr. Ercoli's recall and his knowledge and intent in his testimony before the Grand Jury.

1. Officer John Pindt. In being questioned about his recollection of conversations about the "tax status" of the Technicon Instruments job (page 28, lines 24, 25) stated that they occurred during the years 1968 and 1969 (page 29, lines 6&7). He was asked if he could fix the time better than 1968-1969. His answer was, "no, I cannot". (Page 29, line 24). When pressed further to pinpoint the time, he stated, "I imagine it was sometime in the middle of 1969". (Page 30, lines 3&4). When asked about a conversation with Purdy, the President of the PBA at that time, the witness could not recall what he said about reporting outside income. (Page 31, lines 11 & 12).

With respect to the meeting of January 12, 1972 of the

PBA, the witness could not recall when the meeting started or ended, (Page 47, lines 21-24) the appro. imate number of persons present (Page 33, lines 23-25) or if a vote was taken on the question of an administrative fee (Page 51, lines 7-9).

When the witness was questioned about a conversation with Mr. Purdy within a month after the PBA meeting of January 12, 1972 concerning the administrative fee, he was unable to recall which detectives were present at the time. (Page 37, lines 2-4). In response to a question as to whether the witness was aware that a $.25 per hour administrative fee was being taken out of his hourly earnings, he first stated that he was unaware (Page 41, lines 16-21) and later that he was aware (page 42, lines 21-24).

2. Officer David C. Bell. Mr. Bell testified that he was the recording secretary of the PBA between 1968 and 1972 but he was not positive of the years. (Page 67, lines 18-19). When questioned about the meeting of January 12, 1972 in which the subject of an administrative fee for off-duty jobs was raised, he answered, "I don't know any date, though". (Page 75, lines 3-4). Nor did he recall the number of people present (Page 75, lines 7-9). In fact he testified that he had no independent recollection of the said meeting until he looked at the minutes thereof (Page 77, lines 8-25).

3. Officer William Bell. Although Mr. Bell was questioned about discussions which took place at the PBA meeting of

January 12, 1972, he was never asked to give the date of said meeting from his own recollection (Pages 80-112). He admitted having reviewed the minutes of said meeting several weeks prior to the trial herein (Page 91, lines 12-17). The witnesses' recall concerning other events was extremely poor. He testified to a conversation with several other police officers concerning the proposed $.25 administrative fee. When he was asked to fix the date of said conversation, his only recollection was that it occurred prior to the PBA meeting that it was proposed (Page 83, lines 22-23; Page 84, lines 16-18; Page 100, lines 3-20) and was unable to specify a day, week or month of said conversation.

Mr. Bell recalled that he worked after hours for two separate companies, Poirier and McLane and Lansing Electronics in the year 1969 and that he paid income taxes on the income earned (Page 96). When shown a copy of his tax return for the year 1969, he reversed his testimony and admitted non-payment (Page 97). Is this a credible witness?

Mr. Bell had no recollection of his earning $1,185 from Technicon in 1969, $819 from the New York Telephone Company in 1972 (Page 102). He did not recall whether it was 1973 or 1974 that he reported extra income (Page 102, lines 11-12). he wasn't sure when he started work for the New York Telephone Company. He stated that it was in the fall or latter part of summer (Page 94, lines 5-6). He was reminded of his grand jury

statement that "it was going into cold weather" (Page 94, line 15). When trial counsel reminded the witness that the job started in July of 1971, the witness persisted that the weather was still cold - at four o'clock in the morning (Page 94, line 23).

Near the conclusion of Mr. Bell's vague testimony, the following excerpt of the testimony is worthy of note (Page 103, lines 21-25; Page 104, lines 2-5):

Q. "May I ask you, sir, how you remember that January 12, 1972 meeting so vividly when you can't seem to remember anything else?"

Mr. Weinberg: Objection to the form of the question.

THE COURT: Wouldn't you love to hear him answer that. I'll sustain the objection."

4. Anthony F. Veteran. (former Greenburgh Town Supervisor).

Mr. Veteran could not recall whether a meeting took place on March 20, 1974 (Page 119, lines 5-20) or the date that the Town Board had a discussion concerning a PBA request to have the town administer off-duty jobs (Page 120, lines 19-25; Page 121, lines 2-15) although he did recall that such a discussion did take place and he discussed it.

5. Nicholas C. Russo. (former Greenburgh Town Supervisor).

Mr. Russo, who was Town Supervisor during the period 1968 through 1973, was questioned about conversations with police officers of Greenburgh concerning the problems of their moon-

lighting activities. The witness was unable to recall such conversations. It was obvious from his testimony that the witness was conscientiously trying to remember the events but could not. The following excerpt (Page 308, lines 17-25; Page 309, lines 1-19) is indicative of his sincere effort to do so:

RECROSS EXAMINATION BY MR. ROBERTSON:

Q. "Mr. Russo, after testifying before the grand jury on October 28, 1973, did you return to the Town of Greenburgh?

A. Yes, I did.

Q. And how did you return? By automobile or by train?

A. By automobile. I drove down.

Q. Did you at that time have an occasion to reflect on what your prior testimony had been before the grand jury?

A. While I was driving home I was thinking about it.

Q. And what were those reflections?

MR. WEINBERG: I object, your Honor.

THE COURT: I'll allow it.

A. Well, I was just trying to recall whether, you know--as I indicated earlier, I've had many conversations with various people while I was in office and I was just trying to recall whether or not any specific--you know, the specifics of the questions. I remember various conversations, but I can't pick out what the topic of the discussion was.

So that I sort of, you know, kind of felt maybe some of

these things were discussed but I honestly don't remember.

MR. ROBERTSON: Thank you.

No further questions."

6. Officer Dennis Walsh. Mr. Walsh recalled the conversation with other police officers "sometime in 1971"(Page 131, line 21) concerning a proposed administrative fee and another conversation the night after it was adopted. The witness did not give the date of such adoption ( Page 133).

The witness was asked his recollection of a PBA meeting held in May 1972. He had no recollection, even after being shown government exhibits relating thereto (Page 138). The witness was permitted to testify concerning discussions at PBA meetings concerning off-duty jobs although no time whatsoever was established for such meetings (Page 141-142). He testified about conversations that took place at a PBA meeting held in "1970 or 1971" (Page 144, lines 16-17).

7. Officer Joseph Boyle. This witness was permitted to testify about conversations concerning the tax status of the earnings from the Technicon job which took place at a PBA meeting held in the year 1969 (Pages 159-160). His recall of his earnings from Technicon and the Telephone Company for the years 1969, 1970, 1971 and 1972 was virtually nill (Page 170).

The credibility of Mr. Boyle should be evaluated in the light of other evidence elicited. The witness was censored by the PBA in 1974 for removing literature from the PBA mail

boxes (Page 175, lines 12-14). He also admitted his failure to perform his duty as a police officer in not arresting a person for attempting to bribe another police officer in his presence (Page 176). He further conceded that he is a co-plaintiff in a Supreme Court action in Westchester County to remove Mr. Purdy as President of the PBA. Mr. Purdy is a co-defendant in the case at bar (Page 180).

8. Officer Richard Maier. This witness was permitted to testify about conversations at a PBA meeting concerning the tax status of money earned from outside employment. The only time fixed for said meeting was "during the telephone strike" (Page 248, line 16). The telephone company strike was in the year 1971. He was further permitted to testify about conversations regarding the earnings from Pathmark Corporation. No time at all was specified by the witness as to when said conversation took place (Pages 249-251).

9. Officer Robert J. Brown. Witness was allowed to testify to a conversation with the defendant Ercoli concerning the Pathmark job. No date was fixed for said conversation. The witness had no recollection (Page 266, lines 19-23) nor did he recall the date when the government promised him immunity to testify (Pages 272,273). Mr. Brown admitted that he was under suspension from the Police Department during the Technicon job (Page 267, lines 18-25; Page 268, lines 2-4).

10. Officer Richard W. Downey. The witness gave conflicting

testimony as to whether taxes would be withheld on the Pathmark job which took place in 1972. On cross-examination he gave his understanding that tax would not be withheld (Page 280, lines 19-25). His grand jury testimony , read to him on cross, indicated his understanding that the $6.00 per hour rate was to be "on the books" (Page 281, lines 9-11).

11. Officer Joseph P. Gorey, Jr. The above witness was called by the defendant Ercoli. He testified that the subject of an administrative fee came up at a PBA meeting in "late 1970 or early 1971" (Page 442,443). The $.25 per hour was taken out on the Whitmore job (Page 444) which took place in March of 1971 (Page 453, line 7).

12. Officer Ralph Garofuno. A defendant's witness, Mr. Garofuno could not recall whether he worked for Technicon Industries in 1968 or 1969 (Page 470, lines 17-20).

13. Police Chief William Halstead. Mr. Halstead, a defendant's witness, stated that he issued a directive in February of 1971 relating to the administration of side jobs (Page 475). His recall of the date of the Telephone Company strike was vague as to the year. He was not sure it was in 1971 (Page 486) and his recall of a certain conversation with Ralph Purdy relative to moonlighting activities of police officers could only be pinpointed to "the Russo Regime" (Page 479, line 5), a period of four years.

14. Defendant Robert Ercoli. Paragraph 16 of Count 2 of the indictment herein is the core of the perjury charge against the defendant. It reads as follows:

"16. It was material to said inquiry to ascertain whether the defendant Robert Ercoli had been authorized by the PBA prior to its meeting on January 12, 1972 to remove $.25 per hour as an administrative fee from the cash wages earned by the police in the off-duty jobs at the Phone Company". (Underscoring supplied.)

The defendant strenuously contended that the administrative fee was brought up at the prior meeting of the PBA held on March 10, 1971. He stated that he was not present when a vote was taken but was told about it afterwards by one of the officers of the PBA (Pages 513, 514).

There is other evidence that supports the accuracy of defendant's recall. Officer Walsh, a government witness, recalled a conversation some time in 1971 (Page 131, line 21) and other conversation the night after it was adopted (Page 133). Officer Gorey, a defendant's witness, recalled that said administrative fee came up at a PBA meeting in late 1970 or early 1971 (Page 442,443) and the fee was taken out on the Whitmore job (Page 444) which took place in March of 1971 (Page 453). The police chief, William Halstead, testified that he had issued a directive concerning the administration of off-duty jobs in February of 1971 (Page 475). Would it have not

been a natural sequence of events for the subject of an administration fee to have been taken up by the membership at their PBA meeting held the following month? One uncontroverted fact is that said fee was in fact received by the traffic division starting in the same month of said meeting. It was continued to be received through the end of the Whitmore job and into the Telephone Company job starting in July of 1971 and up to the time of the PBA meeting of January 12, 1972. There is some justification and factual basis for the defendant to believe that the minutes of said meeting were erroneous since the practice had been followed for almost a year prior thereto.

Defendant's testimony that there were no new side jobs coming up in January 1972 has not been controverted by any evidence submitted by the government. He did not know of any at the time and stated that he refused to handle any more jobs (Pages 541, 542). The next job came up the following month. It was the Pathmark job and was handled by Officers Randazzo and Holley (Page 543).

Defendant's recall of a discussion at the PBA meeting of January 12, 1972 concerning the hourly rates to be charged was a candid and sincere effort to remember a long past event. Here is his testimony on that point: (Page 542, lines 1-13)

Q. "Did you raise any question about the hourly rate?

A. There is a possibility I might have. I don't recall.

I don't recall whether I did or not.

Q. There then is a resolution which was passed relating to a new hourly rate.

Did you participate in that discussion, to the best of your recollection.

A. To the best of my recollection, I did not.

Q. Do you know whether you were present at the entire meeting.

A. No. Again, if I had something to say at the meeting, I said it and got out."

Defendant's testimony should be evaluated fairly to determine if he knowingly and willfully lied to the grand jury. Fairness would include a consideration of the fact that he appeared voluntarily before the grand jury (Page 544.) Fairness would include a consideration of the fact that he was testifying as to events that occurred during a four year period prior to his appearance. Fairness would include a comparison of defendant's recall of said events with the poor recall of the government witnesses in this case. Fairness would consider the fact that during this period, the defendant attended hundreds of PBA meetings (Page 545) and that he could be honestly mistaken as to his recollection of the events. Fairness would include a consideration that defendant had no motive to lie about the exact date of a PBA resolution agree-

ing to a 25 cent administrative fee. Defendant admitted receiving the fee almost a year before the meeting of Janaury 1972. There was nothing illegal about this arrangement. There was no reason to lie about it. The police chief wanted his men to administer their off-duty work at no expense to the municipality. That they did so a few weeks later makes sense and corroborates defendant's testimony and honest belief.

The judgment of conviction of the defendant on Count 2 of the indictment should be reversed on the law and the facts.

## POINT IV

THE GOVERNMENT HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF AS TO THE DEFENDANT'S KNOWLEDGE, WILLFULNESS AND INTENT IN MAKING THE FALSE STATEMENTS ALLEGED IN COUNT THREE OF THE INDICTMENT.

The gist of Count Three is whether the defendant had a meeting on July 13, 1971 at 10 County Center Road with Thomas Owens and Richard Lillis in which defendant negotiated the hiring of police by the Telephone Company as security guards during the strike.

Thomas Owens.

Mr. Owens was the only government witness produced at trial who testified about a conversation with the defendant concerning the hiring of policemen. He was General manager of the Telephone Company in the Westchester area. He named Hartman and Lillis as present during this conversation. Lillis never testified and Hartman denied any such conversation (Pages 228, 229, 234). Owens couldn't recall the date of said meeting other than it was "early in the strike period which began in July 1971" (Page 195). His recollection of subsequent conversations with the defendant concerning union activities was extremely poor. An excerpt is submitted: (Page 203, lines 6-15)

"Q. Do you recall the number of instances that Mr. Ercoli gave you information about the union's activities?

A. Oh, I can recall two or three.

Q. Can you place those conversations? Can you give us a time period for those conversations?

A. I can't give you a time period. A strike is just one event, and I can't really tell you whether it occurred in July or August or September, or any other month, for that matter."

On cross-examination, Mr. Owens again admitted that his memory was weak in recalling dates and conversations. An example follows: (Page 209, lines 13-23)

CROSS EXAMINATION BY MR. LAWLER:

Q. "Mr. Owens, I believe on direct examination you indicated that the strike itself was one big event in your mind at this time, is that a correct statement?

A. Yes.

Q. Would I be correct, then, that as far as distinguishing dates or what conversation took place at particular meetings, you are not entirely clear in 1976?

A. Yes. As to the specific date when those occurred?

Q. Yes.

A. That would be true."

Thomas Hartman.

Mr. Hartman, called as a government witness, denied being present at a meeting where there was a conversation about hiring police (Page 227-228). In fact, he testified that he couldn't recall any discussion with Mr. Ercoli prior to the

hiring of police (Page 228, line 25; Page 229, lines 1-4; Page 233, lines 24-25; Page 234, lines 2-4).

The defendant Ercoli testified that he had numerous meetings at 10 County Center Road during the course of the Telephone Company strike "once or twice a day and sometimes more" (Page 523, line 15). His best recollection of a conversation with Telephone Company officials on hiring off-duty policemen was that it took place at police headquarters. When asked if it was possible that the said meeting took place at 10 County Center Road, his answer was, "Yes, it is very possible it took place there" (Page 524, line 12). Bearing in mind that the defendant was trying to recall events that had occurred almost four years before his grand jury appearance and five years before trial, was it not entirely possible that the defendant was honestly mistaken? Or is it not equally possible that Mr. Owens' memory was as poor as to this conversation as it was to others that he could not recall? The defendant had nothing to hide about this conversation. He had no motive to lie. There is no government proof that he actively solicited side jobs for policemen with Telephone Company officials. Even if he had, there was nothing wrong with such activity on his part. He did not ask for cash payment. That was a decision of the Telephone Company itself (Pages 230, 234). It was a practice they were following with other police department in Westchester County (Pages 235, 236) and

they were doing it to save paying additional benefits to these off-duty policemen (Pages 237, 240). The government witness Hartman denied any conversation with the defendant regarding the issuance or non-issuance of W-2 tax forms (Page 238). That, again, was their own decision. What, then, is the conceivable importance of whether a conversation regarding the hiring of off-duty policemen took place at police headquarters or at 10 County Center Road? It should certainly not be the basis for the perjury conviction of the defendant. Its materiality to the conspiracy charge against the defendant rests on an extremely thin line that should not be allowed by this Court.

It is respectfully submitted that the government's proof on this count is exceedingly thin. It is inconsistent evidence by its own two witnesses. It is not of the quality and quantity to support a criminal conviction on the serious charge made against the defendant.

The conviction should be reversed.

## Conclusion

The conviction of the defendant on Counts One, Two and Three of the indictment should be reversed.

Respectfully submitted,

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Of Counsel

STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.:

JEROME MAYER, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 605 Harrison Avenue, Harrison, New York 10528.

That on the 29 day of November, 1976, deponent personally served the within appellant's brief upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing ---------- true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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JEROME MAYER

Sworn to before me this

29 day of November, 1976

MARCIA E. FAATZ
Notary Public, State of New York
No. 31-4614895
Qualified in New York County
Commission Expires March 30, 197.7

Marcia E. Faatz